I SA / Gl 141/20 - Judgment of the Provincial Administrative Court in Gliwice

Date of the judgment	2020-07-28 *invalid judgment*
Date of receipt	2020-02-03
Court	Provincial Administrative Court in Gliwice
Judges	Beata Machcińska / chairman rapporteur /
Symbol with description	6110 Value-added tax 6560
Thematic slogans	Tax interpretations
The appealed authority	Director of the National Tax Information
Result content	The reimbursement of the costs of the proceedings was awarded. The contested individual interpretation was repealed
Cited regulations	Journal of Laws 2018 item 2174 art. 28b paragraph. 2 *Act of March 11, 2004 on tax on goods and services - consolidated text*

SENTENCE

Provincial Administrative Court in Gliwice composed of the following composition: Chairman Judge of the Provincial Administrative Court Wojciech Gapiński, Judges of the Provincial Administrative Court Beata Machcińska (spokesman), Adam Nita, Record Keeper Katarzyna Czabaj, after hearing at the hearing on July 14, 2020, the case from the complaint of A GmbH in L. on the interpretation of the Director of the National Tax Information of [...] No. [...] on tax on goods and services 1) repeals the challenged interpretation, 2) awards the Director of the National Tax Information to the complainant the amount of 697 (six hundred and ninety-seven) zlotys for reimbursement of the costs of the proceedings.

SUBSTANTIATION

The subject of the complaint by A GmbH in L., Switzerland (hereinafter "complainant" or "company" or "applicant") is an interpretation of the Director of the National Tax Information (hereinafter also "interpretative body") in the matter of tax on goods and services.

The status of the case is as follows:

1. In the application for an interpretation, the company presented the following facts and a future event:

It is an entity based in Switzerland, registered as a VAT payer active in Poland, conducting business in the field of trade in goods.

As part of its business activities, the company acquires logistics and warehouse services as one of the recipients of the entity based in Poland, specializing in the provision of this type of service (hereinafter: "Logistics Operator"), as well as the so-called auxiliary logistic services (described in detail later in the application) from A1 sp. z oo These entities are registered as VAT payers active in Poland (hereinafter "Service Providers").

The company indicated that in the course of a tax inspection initiated against the company in the field of tax on goods and services, the controlling bodies, in terms of the facts, determined, inter alia, that the company acquires logistic services including: storage of goods, preparation of customer orders for shipment / delivery, marking goods, other services that add value to goods, dealing with returns, running an e-warehouse for customer goods, transport planning and management, transport tracking services. As part of the services, the company does not acquire any space / warehouses used by the Logistics Operator. As agreed with the Logistics Operator, the company's staff has the right to access the property during opening hours and this is done under the supervision of employees and with the consent of the Logistics Operator. Moreover, the company acquires additional logistics and warehousing services from A1 Sp. z o. o. and which are necessary to ensure the smooth operation of CEDC, are carried out in the same location, ie at the premises of the Logistics Operator. The auditors also indicated that "The company A GmbH, using the infrastructure and personnel belonging to the Logistics Operator in Poland, as well as A1 Sp. Z oo in an organized and continuous manner, conducts activities under which it carries out activities subject to VAT The inspectors stated that the company has a permanent place of business in the territory of the country, in the place where logistics services are provided, in a warehouse run by the Logistics Operator. The company, disagreeing with the inspection conclusions, made reservations and explanations to the protocols (hereinafter "reservations"), which were not taken into account by the inspectors; on the day the company submitted the application for an interpretation, no tax proceedings, tax inspection, customs and tax inspection were pending, and in the scope covered by the application, the matter was not resolved by a decision or ruling (the authority's letter of September 3, 2019 in the case file).

The company indicated that it operates in the A 'group, which mainly manufactures and sells various types of goods (eg [...] and many others) around the world. The company's economic activity in Switzerland includes, first of all, coordinating, managing and conducting appropriate decision-making processes in relation to the operational (commercial) activities of the company conducted in other countries (including Poland). In other words - in Switzerland there are employees of the company who make all decisions on its operation on its behalf (including, for example, the appropriate management of logistics processes). Most of the administrative processes are also performed there. All resources owned by the company are also collected in Switzerland (such as office, computer equipment, cars, etc.). In practice, the company purchases goods in the following transactions:

• intra-community acquisitions of goods,

• Domestic purchases of goods through local deliveries made to the company.

As for the delivery of goods, the company carries out the following transactions:

• intra-community supplies of goods,

• Domestic deliveries of goods,

• Export of goods.

The goods belonging to the company are stored in Poland at the warehouse of the Logistics Operator (CEDC), which is also responsible, inter alia, for handling their transport.

The Logistics Operator performs the following activities for the company:

1) Storage of goods.

2) Preparation of the company's orders for shipment, taking into account the different shipping methods used by the company.

3) Return management (for goods to be sent back to CEDC), handling company-owned returns.

4) Provision of additional services (marking / labeling, packaging of goods). The service provider is responsible for managing and ordering all necessary labels (but not the contents of the labels).

5) Receiving complaints within 48 hours and responding to them within 5 working days from the date of notification (with possible exceptions for complaints from automotive customers).

6) Quality control and control of transport conditions when receiving and shipping products.

7) Planning and service of transport.

8) Services related to the tracking of transports (so-called tracking).

9) Receiving products within 24 hours.

10) Completing and preparing orders for shipment within 24 (including product labeling) or 48 (including labeling, products in accordance with the company's special requirements) hours.

The above activities are performed for the benefit of the company, in principle, with the use of the warehouse referred to in the CEDC Application.

Additionally:

- The company does not have the exclusive rights to dispose of, administer or manage all or part of the real estate where its goods and services are stored.

- The company has concluded an agreement with the Logistics Operator for the provision of general, comprehensive logistics services, which does not provide the company with exclusivity in the purchase of services from the Logistics Operator / storage of goods in a given place.

- The Logistics Operator provides administrative and logistic services not only to the company, but also to other entities. The said provision of services may also take place on the same property.

- The company does not conclude civil law contracts with employees of the Logistics Operator.

- Machines on which logistic services are performed are the property of the Logistics Operator, or the Logistics Operator leases them from a third party.

- Over the years, in the course of providing services to the company, it happened that the goods did not fit into the warehouse of the Logistics Operator (CEDC). In such a situation, the Logistics Operator informed the company about the situation and used the space in another warehouse.

In turn, in accordance with the concluded agreement, the services provided by A1 Sp. z o. o. the services include:

1) Intra-group customer service (order processing activities).

2) Complaints and returns handling.

3) Work on the compliance of systems (SAP-WMS - Warehouse Management System, i.e. the Warehouse Management System).

4) Preparation of import / export documentation (cooperation with customs agencies and carriers initiated by A).

5) Inventory control.

6) Handling commercial orders from Central and Eastern Europe (excluding orders from Poland).

7) CEDC project management (including process development).

8) Ongoing cooperation with the logistics service provider - related to the collection of goods / shipment / value added services (VAS).

The contract between the company and A1 Sp. z o. o. concerns additional logistics and warehousing services that are not provided by the Logistics Operator under the previously indicated contract, and are necessary to ensure the smooth operation of CEDC. This contract is an "auxiliary contract" (apart from the main contract concluded with the Logistics Operator), covering additional activities / services provided to the company to the extent that they are not performed by the Logistics Operator (these services are performed in the same location, i.e. CEDC). This service is performed using the warehouse of the Logistics Operator (CEDC). No other warehouse is used for this purpose. The company has never concluded any civil law contracts with employees of A1 Sp. z o. o

The company indicated that it acquires new customers by establishing new business contacts and conducting trade negotiations. The company's operations in this area are not carried out on the territory of Poland, but in Switzerland. Orders are generally transferred to the company by local A 'distributors. On the basis of the orders received, the company purchases the goods from A"s local suppliers (i.e. deliveries are made to A 'by the local entities producing the goods in question). After the company receives the order, properly prepared and packed goods are transported from factories located in Poland to the appropriate logistics centers (including CEDC in Poland). The company sends electronically information on planned "deliveries" of goods to the warehouse to the Logistics Operator. The company then submits the order and specification by electronic means, on the basis of which the Logistics Operator prepares the goods sold by the company for loading and transport. The company is responsible for the organization of transport (partially outsourcing this activity to the Logistics Operator). The goods sold by the company may be transported to another logistics center (where they are prepared for further shipment to the final recipient) or directly to end customers.

The company is not and will not be the owner of any assets located in Poland, it has not employed or employs any employees in Poland, has not concluded or concluded any civil law contracts with employees. There may be situations in which the company's employees located in Switzerland occasionally come to

Poland (however, this should not occur more than a few times a year). Possible visits to the real estate where logistics services are provided to the company are limited only to the quality control of the services provided (according to strictly defined rules) and, as a rule, do not occur regularly. The goods are stored by the Logistics Operator at the company's request in order to

2. The company asked the following questions:

1) Is the territory of Poland for the provision (taxation) of logistics services provided by the Logistics Operator to the company?

2) If the answer is yes to question 1, i.e. it is recognized that the place of provision (taxation) of logistics services provided by the Logistics Operator to the company is the territory of Poland - does the company have the right to deduct input VAT resulting from invoices issued to it by the Operator Logistics for the provision of the above-mentioned services?

3. Company position:

The company stated that both the Logistics Operator and A are legal persons performing independent economic activity within the meaning of the provisions within the meaning of Art. 15 sec. 1 and sec. 2 of the Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2018, item 2174, as amended, hereinafter "uptu" or "VAT Act"), and goes - they should be considered taxpayers within the meaning of the analyzed provisions.

Referring to Art. 28b paragraph. 1 of the VAT Act, indicated that the company's registered office is located in Switzerland, therefore the place of provision of the logistic services in question by the Logistics Operator to the company should be Switzerland.

Referring in turn to Art. 28b paragraph. 2 of this Act, explained that the Act of March 11, 2004 on tax on goods and services and the implementing regulations issued on its basis do not define the concept of a "permanent place of business". Nevertheless, such a definition is provided for in Art. 11 sec. 1 and sec. 2 of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 / EC (Journal of Laws 2011, L 77, p. 1, hereinafter: "Regulation 282/2011").

The company, by analyzing art. 11 sec. 1 and 2 of Regulation 282/2011 and the judgments of the CJEU, stated that it does not have a permanent place of business in Poland for the following reasons:

- Service providers operate independently of the company's management, i.e. they are free to provide services both to the company and third parties (moreover, the Logistics Operator is an entity fully independent from the company, i.e. not related to it by capital or person). In particular, they are not subject to a company day-to-day control comparable to that which the company could possibly acquire its own personnel and technical resources.

- According to the concluded contracts, the company does not have exclusivity in the scope of services provided by Service Providers. The company's service providers (in particular the Logistics Operator) also provide services to other entities, completely independent from the company. As a consequence, the company does not have the knowledge or decision-making capacity to commit specific resources at a specific time for the purpose of providing services to it (as these resources may also be used for the purpose of providing services by Service Providers to other entities).

- The company also does not have ongoing control over the possible availability of resources for the purpose of providing services to it. It is the Service Providers - on their own - that ensure that they have an appropriate number of employees / machines / warehouse space - so that it is possible to provide services to the company.

- The Company has no influence on such elements as the working time of people employed by the Service Providers, the employment status, or the type and technical condition of the devices used by the Service Providers. It is true that the contract concluded with the Logistics Operator generally provides for the conditions for the provision of services (such as warehouse working hours or quality requirements for the service provided), nevertheless, these regulations do not give the company the right to exercise any control over the resources, but only ensure adequate the quality of the services provided (which - as a rational entrepreneur - the company has the right to require from its Service Providers).

- Agreements concluded by the company do not provide that it has the right to freely enter real estate used by the Service Providers to provide services to it. This access cannot be considered as free, as it is possible only during the days and hours of the warehouse opening hours, and moreover, the company must inform its representatives about each planned visit and obtain the consent of the Logistics Operator. Additionally, each visit is supervised by the employees of the Logistics Operator. In practice, therefore, the company has access to real estate on the same terms as other contractors of the Logistics Operator, and the applicable procedures in this respect do not differ from the market standard.

- The company does not have the exclusive right to dispose of, administer or manage all or part of the property where its goods are stored.

- The company has no discretion as to where specifically (ie in which part of the property) its goods will be stored, it is up to the service provider. In addition, there may be occasions where the company's goods - in the absence of space at CEDC - are stored elsewhere.

The company emphasized that the Service Providers operate in a manner completely independent of A's management, i.e. they are free to provide services both to the company and third parties. In particular, they are not subject to the ongoing control of a company comparable to that which the company could potentially take over its own personnel and technical resources located in Poland. The above leads to the conclusion that the company not only does not have its own resources in Poland, but also does not have control over the resources of the Service Providers in a manner comparable to that it could control its own resources.

Consequently, the condition required to state that the company has a permanent place of business in Poland (the existence of an appropriate structure in terms of technical and personnel facilities) is not met.

The company emphasized that all management decisions - regarding the company's operation - are made outside Poland, and none of the Service Providers has the authority to make any decisions or obligations on behalf of the company, in particular concluding contracts on behalf of and for A. does not have its own technical or personnel resources in Poland. Undoubtedly, therefore, based solely on the resources of Service Providers located in Poland, it would not be possible to receive and use the services provided for the needs of this structure (due to the fact that none of the Service Providers' employees is authorized to incur liabilities or undertake any obligations). decisions on behalf of the company). In the company's opinion, also these elements of the facts speak for the recognition that

In addition to the application, the company drew attention to the theses resulting from the Opinion of the Advocate General in case C-547/18 Dong Yang, issued on November 14, 2019, regarding the existence of a permanent place of business of a foreign enterprise in Poland.

According to the company, the place of provision of logistic services provided by the Logistics Operator to it in the described actual state / future event is not Poland, therefore these services should not be subject to VAT in Poland. Nevertheless, if the interpretative body stated otherwise, the company is of the opinion that it has the right to deduct input VAT resulting from the invoices issued to it by the Logistics Operator for the provision of the services in question.

4. In the interpretation of [...], the interpretative body found the company's position as: 1) incorrect in the scope of taxation of purchased logistics services and 2) correct in terms of the right to deduct input VAT resulting from invoices documenting logistics services.

The interpretative body indicated that, as a rule, the service provided to the taxpayer within the meaning of Art. 28a uptu, other than that indicated in art. 28e, art. 28f paragraph. lila, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and 2 and article. 28n uptu, is subject to taxation at the place of the service recipient's place of business (Article 28b (1) of the taxpayer), unless it is provided for the customer's fixed place of business, which is located in a place other than his seat of business, then the place of providing this service there is a fixed place of business for which this service is provided (Article 28b (2)). Citing the provisions of Regulation 282/2011 and the rulings of the CJEU and administrative courts, the interpretative body stated that that the entity has a permanent place of business in the territory of the country, if using its infrastructure and personnel in an organized and continuous manner, it conducts activities in which it carries out activities subject to tax on goods and services. This means that the technical infrastructure and personal involvement must be closely related to the performance of taxable activities. It is therefore necessary for a permanent establishment to be considered that that place not only uses the goods and services but also itself is able to carry out taxable activities pursuant to Art. 5 sec. 1 of the act. However, it is not necessary to recognize the entity's activity as a permanent place of business in Poland, that the entity itself provides services or supplies goods with sufficient resources. It is also important that the created business structure of the entity is able to receive and use the services provided for its own needs. At the same time, it is not necessary to have own personnel and technical resources to adopt a permanent place of business in a given country, but the taxpayer must be entitled - under the requirement of sufficient permanence of the place of business - to have comparable control over the personnel and technical resources. If a given entity has its personnel and structure (including technical infrastructure) in a given country, characterized by adequate stability, it has a permanent place of business in that country. However, it is irrelevant - which should be emphasized - whether they are employees directly employed by this entity or their "own" infrastructure. The case law of the CJEU shows that the use of human and technical resources of another entity may also lead to the creation of a permanent place of business in another country.

In the opinion of the interpreting body, in the light of the presented circumstances of the case, although the company is not and will not be the owner of any assets located in Poland, nor has it employed or employs employees in Poland, it should be stated that by engaging the necessary technical and human resources belonging to it has created a permanent place of business for other entities. In order to recognize that a specific place of business is a permanent place of business, it is necessary to have technical infrastructure and human staff who can independently perform certain activities. At the same time, the personal and material structure in a permanent place of business should be permanent and permanent.

In the presented circumstances of the case, conducting business in Poland on a permanent basis results from the provision of permanent and necessary for this purpose technical and human resources for the needs of commercial activity, and it is not necessary to have your own human resources to adopt a permanent place of business in a given country. and technical facilities, as long as the availability of other facilities is comparable to the availability of own facilities (the taxpayer

must have comparable control over the personnel and technical facilities). The economical use of people and equipment is important here. In the present case, the criteria for having a minimum size of activity with a certain level of stability are met, where there are human and technical resources necessary for the conduct of the taxpayer's business. The use of the technical infrastructure and personnel available in Poland to perform part of the company's business activities in an organized and continuous manner qualifies the planned activity of the company in the territory of the country as a permanent place of business in Poland.

In the opinion of the interpreting body, the facts presented in the application for an interpretation indicate that the company's operations in Poland meet the conditions for being considered a permanent place of business in Poland, as it is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources. The services provided by the Logistics Operator should be considered as provided to the company's permanent place of business located in Poland. Therefore, they are not taxable pursuant to Art. 28b paragraph. 1 upt at the company's seat, but pursuant to Art. 28b paragraph. 2 uptu in Poland, i.e. in the country where the company has a permanent place of business for which the services are provided.

5. In her complaint to the Provincial Administrative Court in Gliwice, the complainant requested that the challenged interpretation be revoked and that the authority be ordered to pay the costs of the proceedings, including the costs of legal representation, in accordance with the norms prescribed by law, alleging a breach of:

1) provisions of substantive law, i.e. art. 28b paragraph. 1 and 2 of the VAT Act in connection with Art. 11 of Regulation 282/2011 through their misinterpretation and, consequently, an incorrect assessment of their application, which resulted in the recognition that the company has a permanent place of business in Poland, and thus that the place of provision of logistic services indicated Poland is included in the description of the facts / event of the future application.

2) breach of procedural law that could have had a significant impact on the outcome of the case, i.e. art. 121 § 1 in connection with with art. 14h, art. 14c § 2 of the Tax Ordinance of August 29, 1997 (Journal of Laws of 2019, item 900, as amended, hereinafter referred to as "Tax Ordinance" or "op") by failure to indicate in the legal justification of the interpretation of the reasons that may result in the fact that in the analyzed case the conditions for the existence of a permanent place of business for the company in Poland are met.

The complainant, referring to Art. 11 sec. 1 and 2 of Regulation 282/2011 and the judgments of the CJEU, indicated that in order to conclude that a foreign entity has a permanent place of business in Poland, it must be shown that the structure used by such an entity in Poland is characterized by the following elements that must be met jointly: a) sufficient stability of the conducted business activity, b) appropriate structure in terms of technical and personnel facilities, c) appropriate independence and independence of the structure.

In this context, the applicant argued that it did not have any resources of its own in Poland that would allow it to carry out that economic activity independently. The Company, however, "uses" certain resources of the Service Providers by purchasing services from them. In its opinion, in order to establish the existence of a fixed place of business, it is not sufficient for a given foreign entity to purchase any services from subcontractors (who obviously use human and technical resources for the purpose of providing these services). It is necessary that, as part of the provision of these services, the availability of personnel and technical facilities made available to a foreign entity is comparable to the availability of its own facilities. Otherwise, absurd conclusions could be drawn According to which the acquisition by a foreign entity of any services provided on the territory of Poland with the use of "local" resources would create a permanent place of business in Poland. Such conclusions are unfounded for obvious reasons.

Therefore, having regard to the theses presented by the CJEU in case C-605/12 **Welmory, the** complainant emphasized that she did not have control over the Service Providers' resources (i.e. over employees, machines or real estate used for the purpose of providing services to her) and presented the most important circumstances supporting the application.

In turn, pointing to the lack of adequate independence and independence of the structure, she argued that all management decisions - regarding the functioning of the company - are made outside Poland, and none of the Service Providers has the authority to make any decisions or obligations on behalf of the company, in particular concluding contracts on behalf of and for the benefit of the company.

Justifying the violation of the procedural provisions, the complainant argued that the interpretation lacked a reliable and consistent explanation as to why the authority considered that the indicated conditions (for the existence of a permanent place of business) were met in the analyzed facts. The argument presented by the authority itself is very laconic. The justification did not contain any arguments that could justify why the authority considered that the company exercises control over the resources of the Logistics Operator (which is an entity fully independent of the company and provides services in parallel to a number of other entities), which could be comparable to the control over the resources own. Thus, in the justification, the authority answered the question "what" it thinks, but it did not justify "why" he thinks so. The authority in no place of the interpretation included an argument about what specific premises it followed when issuing the interpretation, in particular it did not refer to the degree of control that the company has over the resources of the Service Providers cooperating with it.

According to the complainant, the authority did not address the individual arguments justifying her position as described in the application, including the opinion of the Advocate General of the CJEU in case C-547/18 Dong Yang, cited by the complainant.

6. In response to the complaint, the interpretative body applied for its dismissal, maintaining the current position in the case.

The Provincial Administrative Court in Gliwice considered the following:

The complaint deserves to be upheld.

Court control - pursuant to art. 3 § 1 and § 2 point 4a of the Act of August 30, 2002, Law on proceedings before administrative courts (i.e. Journal of Laws of 2019, item 2325 hereinafter: "PPSA"), the individual interpretation of the tax law of [...] concerning tax on goods and services in the scope of taxation of purchased logistics services and the right to deduct input VAT resulting from invoices documenting these services.

The dispute in the present case revolves around the issue of whether, in the described facts, which under Article 14c of the Tax Law is binding on both the interpretative body and the Court, the applicant has a permanent place of business in Poland within the meaning of Art. 28b paragraph. 2 of the VAT Act and Art. 11 of Regulation 282/2011 and art. 44 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax (Journal of Laws 2006, L 347, p. 1), amended by Council Directive 2008/8 / EC of 12 February 2008 (Journal of Laws 2008, L 44, p. 11, hereinafter referred to as "Directive 2006/112"), and thus whether the services purchased by the company will be taxed in Poland.

The court fully shares the arguments presented in the judgments of the Provincial Administrative Court in Gliwice: of January 7, 2019, file ref. III SA / Gl 908/18 and of 27 February 2019, file ref. III SA / Gl 913/18, dated November 20, 2019, file ref. I SA / Gl 737/19 and of March 11, 2020, file ref. act I SA / Gl 1029/19

(all the cited rulings of administrative courts are available in the internet database of the Supreme Administrative Court's rulings at: http://orzeczenia.nsa.gov.pl), therefore it will be used in the further part of the justification.

According to Art. 15 of the VAT Act, taxpayers are legal persons, organizational units without legal personality and natural persons who independently perform the economic activity referred to in paragraph 2, regardless of the purpose or result of such activity.

Based on Article. 28b paragraph. 1 of the VAT Act, the place of the provision of services in the case of the provision of services to the taxpayer is the place where the taxpayer who is the recipient of the service has its registered office, subject to paragraph 2-4 and art. 28e, art. 28f paragraph. 1 and 1a, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and 2 and article. 28n.

In the event that the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of provision of these services is the permanent place of business (Article 28b (2) of the VAT Act).

With art. 11 sec. 1 of Regulation 282/2011 it follows that a fixed place of business means any place that is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable it to receive and use the services provided for its own needs of this permanent place of business.

The issue of the conditions for recognizing what should be understood as a permanent place of business has been the subject of many judgments of national and EU courts, which have evolved in subsequent judgments, taking into account the conditions and mechanisms of economic trading.

In one of the latest judgments - the judgment of 7 May 2020 in case C-547/18, the CJEU ruled that Article 44 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax, amended by Council Directive 2008/8 / EC of 12 February 2008 and Art. 11 sec. 1 and art. 22 sec. 1 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 should be interpreted as meaning that the service provider cannot infer the existence in the territory of a Member State of a permanent place of business of a company with its registered office in a third country by the mere fact that that company has a subsidiary in that Member State and that the service provider is not required to conduct an audit to make such an assessment,

In turn, in the judgment of October 16, 2014 in the **Welmory** caseC-605/12, EU: C: 2014: 2298 The CJEU stated that the first taxpayer established in one Member State and who uses the services provided by a second taxpayer established in another Member State should be considered as having another Member State has a "fixed place of business" within the meaning of Art. 44 of Directive 2006/12 / EC, in order to determine the place of taxation of these services, if that fixed location is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable it to receive services and use them for the purposes of his business, which will be examined belongs to the referring court. The ruling concerned a Cypriot company that organizes auctions on an online sales platform. It sells "BIDÓW" (rates) packages, ie the right to submit offers to purchase the goods put up for auction by offering a higher price than the last one proposed. This company concluded a cooperation agreement with a Polish company consisting in providing it with an exclusive auction website under the appropriate domain along with accompanying services (advertising, handling, information provision and data processing services). The Polish company generated revenues from online auctions on the website of the Cypriot company and a part of the profit of the Cypriot company from the sale of BIDs, which are used by customers in Poland to submit an offer at the auction on this website. The Tribunal emphasized that the question concerns the interpretation of Art. 44 of

Directive 2006/112 from the point of view of the recipient, and the existing case law has taken into account the point of view of the service provider, which means that when interpreting, one should take into account the wording of the provision, its context and the objectives of the regulation which this provision constitutes a part of (avoidance of double taxation or non-taxation of revenues). As pointed out by the Court, the most useful link for determining the place of supply of services from a tax point of view, and therefore the main link, is the place where the taxpayer has his place of business. It is only possible to take another place into account where considering the seat as a connecting factor does not lead to a reasonable solution or creates a conflict with regard to another Member State. The Tribunal also indicated that in Art. 44 of the Directive, the seat of business comes first, and the permanent place of business only second, which is an exception to the general rule. Hence, the indication of own personnel and technical facilities, or the availability of other facilities comparable to the availability of own facilities (personnel, technical), control over these facilities, the possibility of receiving and using the purchased services for their own needs - conducting business activity of the contractor. The services provided by the Polish company to the Cypriot company should be distinguished from the services provided by the latter to the consumers in Poland.

In the opinion of the Court, the above judgment of the CJEU, although it does not correspond to the facts of the case at hand, contains important guidelines regarding the definition of the concept of a fixed place of business.

Following the above indications, also resulting from other judgments of the CJEU, regarding the determination of a permanent place of business, it should be noted that a certain minimum scale of activity is necessary, which is an external feature that activity in this place is carried out continuously (judgment C-231/94), i.e. in a permanent, repetitive and permanent manner (judgment 168/84), a minimum durability is also required by pooling the permanent human and technical resources necessary to provide certain services independently (judgment C-73/06 or C-260 / 95).

In the description of the facts / future event, the applicant indicated that it was based in Switzerland and that it operated in the A 'group, which mainly produces and sells various types of goods around the world. The applicant's economic activities in Switzerland consist mainly of coordinating, managing and carrying out the relevant decision-making processes in relation to the company's operating (commercial) activities in other countries (including Poland). The complainant purchases logistic services and auxiliary logistic services on the basis of contracts concluded with Operator Logistyczny and A1 sp. Z oo, respectively. Logistics services include mainly: storage of goods, provision of additional services (marking / labeling, packaging of goods), planning and handling of transport. On the other hand, auxiliary services provided by A1 Sp.

The interpretative body, referring to Regulation 282/2011 and the rulings of the CJEU, stated that the entity has a fixed place of business in the territory of the country, if, using its infrastructure and personnel, in an organized and continuous manner, it conducts activities in which it carries out activities taxed with value added tax. He pointed out that technical infrastructure and personal involvement must be closely related to the performance of taxable activities. It is therefore necessary for a permanent establishment to be considered that that place not only uses the goods and services but also itself is able to carry out taxable activities pursuant to Art. 5 sec. 1 of the act. However, it is not necessary for the entity's activity to be considered a permanent place of business in Poland for the entity itself to provide services or deliver goods using sufficient resources. It is also important that the created business structure of the entity is able to receive and use the services provided for its own needs. At the same time, it is not necessary to have own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient permanence of the place of business - comparable control over the personnel and technical resources. or did he deliver goods. It is also important that the created business structure of the entity is able to receive and use

the services provided for its own needs. At the same time, it is not necessary to have own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must be entitled to comparable control over the personnel and technical resources under the requirement of sufficient permanence of the place of business. or did he deliver goods. It is also important that the created business structure of the entity is able to receive and use the services provided for its own needs. At the same time, it is not necessary to have own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must be entitled to comparable control over the personnel and technical resources under the requirement of sufficient permanence of the place of business. At the same time, it is not necessary to have your own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient permanence of the place of business - comparable control over the staff and technical resources. At the same time, it is not necessary to have your own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must be entitled to comparable control over the personnel and technical resources under the requirement of sufficient permanence of the place of business.

In the opinion of the interpreting body, although the complainant is not and will not be the owner of any assets located in Poland, nor has it employed or employs any employees in Poland, it should be stated that by engaging the necessary technical and human resources belonging to other entities, it created a permanent place of business commercial activity in Poland. Running a business in Poland on a permanent basis results from the provision of permanent and necessary technical and human resources for the needs of business activity. At the same time, to adopt a permanent place of business in a given country, it is not necessary to have your own personnel and technical resources, provided the availability of other facilities is comparable to the availability of own facilities (the taxpayer must have comparable control over the personnel and technical facilities). The economical use of people and equipment is important here.

The court shares the complainant's allegation that the interpretative body violated Art. 28b paragraph. 2 of the VAT Act in connection with Art. 11 of Regulation 282/2011 in the manner specified in the petitum of the complaint. The description of the facts / future event shows that the condition for establishing a permanent place of business in the form of gathering permanent human and technical resources necessary to provide certain services independently has not been met. The complainant pointed out that the Service Providers operate independently of its management, i.e. they are free to provide services both to the company and third parties (moreover, the Logistics Operator is an entity fully independent from the company, i.e. not related to it by capital). nor in person). The complainant is not exclusive to the services provided by the Service Providers. The company's service providers (in particular the Logistics Operator) also provide services to other entities, completely independent from the company. Service providers, on their own, ensure that they have an appropriate number of employees / machines / warehouse space so that it is possible to provide services to the company. The Company has no influence on such elements as the working time of persons employed by the Service Providers, the employment status, or the type and technical condition of the devices used by the Service Providers. The contracts concluded by the applicant did not confer on the applicant the right of free access to real estate used by the Service Providers to provide services to her. The applicant does not have the exclusive right to dispose of administration or management of all or part of the property where its goods are stored - there is no freedom of choice as to where specifically (i.e. in which part of the property) its goods will be stored - it is the responsibility of the Service Provider. Moreover, the complainant indicated in the description of the facts / future event that there may be situations where the company's goods - in the absence of space at CEDC - are stored elsewhere. All management decisions - regarding the functioning of the company - are made outside Poland, and none of the Service Providers has the authority to make any decisions or obligations on behalf of the company, including in particular concluding contracts on behalf of and for its benefit. in which part of the property) its goods will be stored - it is at the discretion of the Service Provider. Moreover, the applicant indicated in the description of the facts / future

event that there may be situations where the company's goods - in the absence of space at CEDC - are stored elsewhere. All management decisions - regarding the functioning of the company - are made outside Poland, and none of the Service Providers has the authority to make any decisions or obligations on behalf of the company, in particular concluding contracts on behalf of and for its benefit. in which part of the property) its goods will be stored - it is at the discretion of the Service Provider. Moreover, the applicant indicated in the description of the facts / future event that there may be situations where the company's goods - in the absence of space at CEDC - are stored elsewhere. All management decisions - concerning the functioning of the company - are made outside Poland, and none of the Service Providers has the authority to make any decisions or obligations on behalf of the company, including in particular concluding contracts on behalf of and on its behalf.

To sum up, the description of the facts / future event shows that the complainant does not employ any employees in Poland, does not delegate its employees to perform tasks in the territory of Poland, and does not outsource them. It does not exercise any control over the Service Providers' personnel. The infrastructure is also not subject to the complainant's supervision and is also used by the Service Providers to provide services to other entities. Such disclosure cannot be derived from the fact that the complainant's representatives may, during the warehouse's working hours, control the quality of the services provided after prior notification to the Logistics Operator. The provision of logistic services, including storage of goods, from providing the applicant with storage facilities, which in the analyzed facts / future event does not take place. Any visits to the property where logistics services are provided to the applicant are limited solely to the quality control of the services provided (according to strictly defined rules) and, as a rule, do not occur regularly. It should be emphasized that this necessary control of the complainant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services established between the complainant and the Service Providers, which - obviously - are determined between the parties to any such agreement and the party's right to demand compliance with the conditions established by contractors. they are limited only to quality control of the services provided (according to strictly defined rules) and, as a rule, do not occur regularly. It should be emphasized that this necessary control of the complainant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services established between the complainant and the Service Providers, which - obviously - are determined between the parties to any such agreement and the party's right to demand compliance with the conditions established by contractors. they are limited only to quality control of the services provided (according to strictly defined rules) and, as a rule, do not occur regularly. It should be emphasized that this necessary control of the complainant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services established between the complainant and the Service Providers, which - obviously - are determined between the parties to any such agreement and the party's right to demand compliance with the conditions established by contractors.

The view expressed in the judgment of the Provincial Administrative Court in Warsaw of July 12, 2017, ref. No. III SA / WA 1979/16, in which the Provincial Administrative Court ruled that the omission of the requirement of "sovereignty" (which was also committed by the authority in the present case) would mean that this criterion is generally met when the entity purchases services provided in a country other than its seat, irrespective of the scope of the entity's powers to manage such personnel, exercise control over them or impose the method of performing the ordered service.

Contrary to the position of the interpretative body, the availability of personnel and technical facilities comparable to the availability of own facilities is not determined by the economic use of people and equipment. Undoubtedly, the purchase of each service purchased by an economic entity is directed at specific economic benefits, which, however, does not automatically create a place of permanent activity in the country where the service provider provides services.

It should be noted that management decisions regarding the functioning of the complainant are made outside the territory of Poland, and none of the Service Providers has the power to make decisions, incur obligations on behalf of the complainant, including concluding contracts on her behalf and for her. The applicant, referring to the above-mentioned CJEU judgment in the **Welmory** case, reasonably pointed out that based solely on the resources of Service Providers located in Poland, it would not be possible to receive and use the services provided for the own needs of this structure (due to the fact that none of the Service Providers' employees is authorized to incur liabilities or undertake any decisions on behalf of the company). The court agrees with the complainant that in the facts of the case / future event, the Service Providers' resources are not characterized by sufficient independence and autonomy to enable them to perform the object of the complainant's business activity independently.

In the view of the Court, the interpretative body therefore wrongly assumed that the applicant had sufficient technical and personnel facilities in Poland to consider that she had a permanent place of business here.

The court also shares the allegations of infringement of procedural provisions.

According to Art. 14c § 1 of the Tax Ordinance Act, the individual interpretation contains an exhaustive description of the factual state or future event presented in the application and the assessment of the applicant's position together with the legal justification of this assessment. The legal justification may be waived if the applicant's position is fully correct.

According to Art. 14c § 2 of the Act, in the event of a negative assessment of the applicant's position, the individual interpretation includes an indication of the correct position together with the legal justification.

Legal grounds for individual interpretation, meeting the requirements of Art. 14c § 2 of the Act, should contain not only the provisions of the law on which the authority based its position, but also an explanation of the meaning of these provisions in the context of the facts provided by the party, with an indication of its essential features (Supreme Administrative Court judgment of 9 January 2020, reference number II FSK 163/18). The legal justification for the interpretation should result from the reasoning of the interpreting body, which led, on the one hand, to the negation of the applicant's position, and, on the other hand, to the body adopting a different position. The legal justification must provide reliable information for the applicant why certain provisions apply in his case, and why the view he expressed does not deserve to be taken into account (judgment of the Supreme Administrative Court of November 15, 2019, file reference number II FSK 3911/17). The legal justification cannot be equated with the citation of legal provisions. The task of the authority is to indicate why, in the light of these provisions, the applicant's view is incorrect and it requires reference to the applicant's arguments (Supreme Administrative Court judgment of 9 January 2020, file ref. II FSK 164/18).

The Court shares the complainant's allegation that the interpretation lacked a reliable and consistent explanation as to why the authority considered that the indicated conditions (for the existence of a permanent place of business) were met in the analyzed facts / future event. In particular, the interpretation lacked arguments that could justify the position that the applicant exercises control over the resources of the Logistics Operator (which is an entity fully independent of the company and provides services in parallel to other entities), which could be comparable to the control over own resources. The applicant submitted extensive and detailed arguments in this regard, pointing to specific circumstances for which, in its opinion, it cannot be stated that that it has a permanent place of business

for the purposes of VAT taxation in Poland, which, in the opinion of the Court, the interpretative body did not refer specifically and exhaustively. In justifying the interpretation, the authority is obliged to assess all the relevant elements of the facts and refer to all relevant arguments of the applicant.

In view of the above, the Court, pursuant to Art. 146 of the PPSA, repealed the challenged interpretation. Indications for the authority in the course of reconsideration result from the above considerations of the Court.

The costs of the proceedings were determined pursuant to Art. 200 and art. 205 § 2 and 4 ppsa, awarding the complaining party an amount including the fee paid for the complaint, costs of legal representation specified in § 2 section 1 point 2 of the Regulation of the Minister of Justice of 16 August 2018 on remuneration for the activities of a tax advisor in the proceedings before administrative courts (Journal of Laws of 2018, item 1687) and stamp duty on the power of attorney